IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1007 OF 2005

Oil and Natural Gas Corporation Limited. (Formerly known as Oil and Natural Gas Commission) A Company incorporated under the Companies Act, 1956 having its Regional Office, Vasundhara Bhavan, Bandra (E), Mumbai - 400 051. ... Petitioner

V/s.

1. Government of Maharashtra Through its Industries, Energy, and Labour Department, Mantralaya, Mumbai - 400 032. ... Respondents

2. Maharashtra Labour Welfare Board, Constituted under Bombay Labour Welfare Fund Act, 1953 having its office at Hutatma Babu Genu Kamgar Kreeda Bhavan, Senapati Bapat Marg, Elphinstone, Mumbai - 400 013.

3. Welfare Commissioner, Maharashtra Labour Welfare Board Having his Office at Hutatma Babu Genu Kamgar Kreeda Bhavan, Senapati Bapat Marg, Elphinstone, Mumbai - 400 013.

4. The Addl. Collector of Mumbai, Mumbai Subsurban District (District Collector Branch) Opp. Chetana College (BMRD Building), 10th floor, Bandra (E), Mumbai - 400 051.

Mr. J.P. Cama, Sr. Counsel with Mr. G.D. Talreja for the petitioner.

Mr. M. More, AGP for respondent Nos. 1 and 4.

Mr. R.M. Sawant, Govt. Pleader for respondent Nos. 2 & 3.

CORAM : F.I. REBELLO &
SMT. V.K. TAHILRAMANI, JJ.

DATED : 19th July, 2006

ORAL JUDGMENT [PER: F.I. REBELLO,J.] :

. The demands made by respondent No. 3 on the petitioner under the provisions of Bombay Labour Welfare Fund Act, 1953 (hereinafter referred to as "The Labour Welfare Act") are the subject matter of the present petition. The petitioner is a Government company, registered under the provisions of the Companies Act, 1956. The petitioner is engaged in various activities including drilling of oil from mines in the High Sees in areas popularly known as "Mumbai High". According to the petitioner, they have assets both Onshore as well as Offshore. The petitioners have various offices located in Mumbai and Nhava, a research institute at Panvel and also a factory located at Uran. These will be known as the establishments, in respect of which the demand has been made by the respondent No. 3. Offshore assets are not the subject matter of any demand. The petitioners contend that apart from factory at Uran, none of the office staff of the petitioner working in the establishments are involved or carrying out any

commercial activity or functions in the nature of business trade or profession. The activities are limited and are exclusively connected with providing support of mining operations of the petitioner on Western Offshore unit. Even the factory at Uran forms an integral part of the core activity of mining. The activity of mining is the overall predominant activity and all other activities are purely incidental. Based on these submissions it is pointed out, that the provisions of the Labour Welfare Act are inapplicable to the petitioners. Apart from that, it is pointed out considering Section 4 of The Bombay Shops and Establishments Act, 1948 (hereinafter referred to as "The Shops and Establishments Act"), the establishments of the petitioners are exempted from the provisions of the Act. In these circumstances also it was not open to the respondent No. 3 to have made a demand on the petitioners. The petitioners contend that the demand under provisions of The Bombay Labour Welfare Fund Act, 1953 (hereinafter referred to as the "Labour Welfare Act") can only be in respect of an employee as defined under Section 2 (2) of the Welfare Act. It does not include a person employed in a managerial capacity or who has been employed in a supervisory capacity and draws wages exceeding Rs.

2500/- per month or exercises either by the nature of duties attached to the office or by reason of the power vested in him functions mainly of a managerial nature. The respondent No. 3, while making a demand on the petitioner, has also included their managerial and supervisory personnel who do not fall under the definition of employee under the Act. The petitioners have commenced their activities or set up establishments in the State of Maharashtra only in 1977 and consequently making a demand on the petitioner from 1971 is without authority of law. Lastly, it is submitted that the petitioner had applied to respondent No. 1 to be exempted by virtue of Section 22 from the provisions of Labour Welfare Act. The application was first made to the State Government by application dated 09.08.1994. The petitioners are providing several facilities to the employees. This has been reiterated in the subsequent application and reminder sent to the respondent No. 1. The respondent No. 1 while rejecting the application for exemption has acted without jurisdiction and consequently the order is liable to be set aside.

2. On behalf of the respondent No. 3, a reply

has been filed by Shri Mahadev Annappa Ingale, the Assistant Welfare Commissioner. It is submitted that under the Labour Welfare Act, provisions have been made for contribution to the fund for financing activities to promote welfare of labour in the State of Maharashtra. Contribution has to be paid by the employer for himself as well as matching contribution of the employees. These contributions are kept in separate fund, known as welfare fund which is utilised by the Welfare Board for carrying out the activity statutorily imposed upon it. The petitioners have establishments in the city of Mumbai as well as in the State. Their establishments fall under the provisions of the Labour Welfare Act. In so far as Offshore establishments are concerned, they are excluded from the applicability of the Act. The petitioners are paying contribution in respect of about 245 employees but under some pretext or other are refusing to pay in respect of the other 1966 employees. The Inspectors of the Board have carried out inspection of the records of the petitioners maintained at the regional office at Bandra and after such inspection demands have been made on the petitioner. As petitioner refused to pay the said amount they moved the Collector, Mumbai Suburban District, Mumbai to effect

recoveries of the amounts as arrears of land revenue. The respondents have only demanded contribution from the establishments which are covered by the Act. The contribution paid are to be used for betterment and upliftment of the working class. The petitioners' contention that they also carry out welfare activity for their workmen is not determinative of whether particular employee is subject to the payment of contribution under the Labour Welfare Act. The contribution, it is pointed out is meagre. Apart from that, it is pointed out that the issues raised are no longer res integra, being covered by the judgments and orders of this Court, in the matter of Mumbai Port Trust, Food Corporation of India and Maharashtra Telephone Nigam Ltd.

3. Considering what has been set out, the issues that require to be decided, may now be formulated as under: -

(i) Whether in view of the provisions of Section 4 read with schedule to the Bombay Shops and Establishments Act, 1948, the petitioners are exempted from payment of contribution under the provisions of Bombay Labour Welfare Act.

Alternatively their premises not being commercial establishments, within the meaning of Section 2(4) of the Shops and Establishments Act?

(ii) Assuming that the predominant activity of petitioner is mining from the ocean-bed, are the establishments and factory of the petitioner's establishments, within the meaning of Section 2(4) of the Labour Welfare Act?

(iii) Was the order of respondent No. 1 dated 04.09.2001 rejecting the application for exemption under the provisions of Section 22 of the Labour Welfare Act discloses non-application of mind on behalf of respondent No. 1 and consequently arbitrary?

(iv) Did respondents 2 and 3 act without jurisdiction, in making a demand on the petitioner from 1971 considering the contention as urged by the petitioner that they commenced operations in the State of Maharashtra only in 1977?

(v) Was respondent No. 3 right in making demand even in respect of Managerial and Supervisory staff who are not employees within the meaning of Section 2(2) of the Labour Welfare Act, consequently is that part of the demand without jurisdiction?

4. We may examine the first contention which is basically dependant on answering the effect of Section 4 of the Shops and Establishments Act. For that purpose and for the contentions to be hereinafter decided, we may gainfully refer to some of the provisions of the Bombay Shops and Establishments Act.

Section 2(4)

"Commercial establishment" means an establishment which carries on, any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession [and includes establishment of any legal practitioner, medical practitioner, architect, engineer, accountant, tax consultant or any other technical or professional consultant and also includes] a society registered under the Societies Registration Act, 1866 (XXI of 1860), and a charitable or other trust, whether registered or not, which carries on [whether for purposes of gain or not] any business, trade or profession or work in connection

with or incidental or ancillary thereto but does not include a factory, shops, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;

Section 2(8)

"Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the [State] Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act;

Section 4

Exemption.- Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the third column of Schedule II shall not apply to the establishments, employees and other persons mentioned against them in the second column of the said Schedule:

Provided that the [State] Government may, by notification published in the Official Gazette, add to, omit or alter any of the entries of the said Schedule [subject to such conditions, if any, as may be specified in such notification] and on the publication of such notification, the entries in either column of the said Schedule shall be deemed to be amended accordingly.

. It would be clear from a consideration of the definition and the exemption clause that the provisions of the Act in respect of establishments mentioned in III Schedule, including employees and other persons mentioned therein, are exempted from the

provisions of the Shops and Establishments Act. Does this enable the petitioner to contend that as the petitioners are exempted under the provisions of the Shops and Establishments Act, they are not an establishments within the meaning of Section 2(4) of the Labour Welfare Act which reads as under: -

> "Establishment" means -
>
> (i) a factory;
>
> (ii) .....
>
> (iii) any establishment within the meaning of the Bombay Shops and Establishments Act, 1948 (Bom. LXXIX of 1948), which employs, or on any working day during the proceeding twelve months, employed (five) or more persons.
>
> . Provided that, any such establishment shall continue to be an establishment for the purposes of this Act, notwithstanding a reduction in the number of persons to less than (five) at any subsequent time:
>
> . Provided further that, where for a continuous period of not less than three months the number of persons employed therein has been less than (five) such establishment shall cease to be an establishment for the purposes of this Act with effect from the beginning of the month following the expiry of the said period of three months, but the employer shall within one month from the date of such cessation, intimate by registered post the fact thereof to such authority as the State Government may specify in this behalf.
>
> [Explanation.-For the removal of doubt, it is hereby declared that where an

> establishment has differnt branches or departments, all such branches or departments, whether situated in the same premises, or different premises shall be treated as parts of the same establishment;]

. In our opinion, a careful reading of Section 4 would indicate that in so far as provisions of the Shops and Establishments Act are concerned, they will not apply to the the establishments, employees and other persons mentioned in the second column of the said Schedule II. This Act was enacted some time in 1948. The State Legislature thereafter has enacted the Labour Welfare Act. In so far as the Labour Welfare Act is concerned, what the Legislature has done is to incorporate the definition of establishment from the Shops and Establishment Act into the Labour Welfare Act. In other words, only the definition of the word establishment has been incorporated into the definition of "establishments" under Section 2(4) of the Labour Welfare Act. The applicability or non-applicability of the provisions of the Bombay Shops and Establishments Act, 1948 is therefore immaterial. The test is whether the establishment is an establishment within the meaning of Section 2 (4) (iii) of the Labour Welfare Act. If the answer is "yes", then the provisions of the Labour Welfare Act would be applicable notwithstanding the exemption of

establishment from the provisions of the Shops and Establishment Act. We are clearly, therefore, of the opinion that the exemption is from the provisions of the Shops and Establishment Act and is not an exemption under the provisions of the Labour Welfare Act. The first contention as urged on behalf of the petitioner must be rejected.

5. The alternative contention as urged on behalf of the petitioners is that these establishments are not commercial establishments. We have already reproduced the definition of commercial establishments under Section 2(4) of the Bombay Shops and Establishments Act, 1948. A commercial establishment has to be an establishment which carries on any business, trade or profession or any work in connection with or ancillary to business, trade or profession. The definition of commercial establishment, however, excludes a factory, shop and other establishments as set out therein from the purview of commercial establishments. However, the definition of establishment under the Shops and Establishment Act includes restaurant and hotel, eating house etc. The definition of establishment under the Labour Welfare Act includes a factory. On

behalf of the petitioners, the learned counsel has drawn our attention to the Judgment of a learned Single Judge of this Court in **Board of Trustees of the Port of Bombay V/s. State of Maharashtra & Ors., 1990 ICLR 403**. The issue before the learned Single Judge was whether the activities other than manufacturing activities being carried out by the Bombay Port Trust, fell within the definition of Shops and Establishments Act and consequently, whether the provisions of the Labour Welfare Act were applicable. It was contended that departments like Accounts Department, Medical Department, Legal Department etc. were not carrying on manufacturing activities and consequently, such wings cannot be said to be carrying on work, incidental or ancillary to the activities carried on for the purpose of manufacture. The learned Single Judge noted that by amendment of 1971 to the Shops and Establishments Act, the concept of establishment has been expanded so as to take within its fold, certain other establishments which were not covered by the first two clauses. The learned Judge found that the petitioners do not dispute that the main Departments are liable for being included under the Act except such other wings are referred hereinabove. After relying on various judgments the Court held that the

concept of business or trade has undergone substantial modification and relying on the dictionary meaning observed that business is a wider term and not synonymous with trade and means practically anything which is an occupation as distinguished from pleasure and profit and even the intention of making profit may not be an essential part of legal definition. The Court held the provisions of the Labour Welfare Fund Act and the objects behind the provisions are laudable and in the larger interest and their and thus their implementation cannot be frustrated on the basis of such contentions which even otherwise on merit have no substance. Our attention was then invited to the Appellate judgment in **The Board of Trustees of Port of Bombay V/s. The State of Maharashtra and anothers in Appeal No. 516 of 1990 in Writ Petition No. 816 of 1983.** This was an appeal against the judgment which we have referred to earlier. The learned Bench considered the definition of establishment and commercial establishment under the provisions of the Shops and Establishment Act. It was argued before the learned bench that the learned Single Judge could not have relied upon the decision under the Industrial Dispute Act to conclude that activities carried out by the appellants amount to business. The Court observed

as under: -

> "In our judgment, the legislature was desirous of bringing every establishment carrying on business, trade or profession under section 2(4) of the Bombay Shops and Establishment Act, within the sweep of Welfare Act and it is not permissible to defeat the intention of the legislature by accepting a restricted meaning."

. Section 22 of the Labour Welfare Act was also considered as the Court observed that the act does not confer a right to get exemption but mainly confers a power upon the State Government to grant exemption and the State Government can exercise its power to avoid serious hardship. Our attention was also invited to two other judgments one in the case of Food Corporation of India & Anr. and in the case of Maharashtra Telephone Nigam Ltd. Both are establishments under the control of the Union of India. In case of Food Corporation of India (FCI), the issue was application for exemption. In other words, the FCI accepted that it was covered by the provisions of Labour Welfare Act but challenged the rejection of application for exemption. In the case of Maharashtra Telephone Nigam Ltd. the division bench relied on the judgment of Port Trust which was adverted to earlier and rejected the contentions urged

on behalf of Maharashtra Telephone Nigam Ltd., challenging the withdrawal of exemption and also that the provision of Bombay Welfare Fund Act are illegal and unconstitutional.

. It would therefore be clear that once the establishments are required to be registered under the Shops and Establishments Act whether they are carrying on work incidental or directly to the main activity of mining would really be immaterial though in some cases it may have some bearing. In the instant case, the petitioners have not denied that they are establishments. Their main contention is that the establishments are doing work incidental to the mining activity of mining. In other words though they may be carrying on activities which would bring it within the purview of commercial establishments because they are doing work ancillary to mining, they are not an establishment within the meaning of the Labour Welfare Act. Consequently the point as urged on behalf of petitioners must be rejected.

6. We may now deal with the second contention as urged on behalf of the petitioners herein. It is submitted that predominant activity in which the

petitioners are involved, are mining activities. The petitioners have been granted petroleum mining lease from time to time on terms and conditions laid down in the Western Offshore area, where the petitioners are carrying out exploration, drilling and production activities. As the activities of mining is a principal activity and the other activities are ancillary or subsidiary to the mining activity, the provisions of the Labour Welfare Act or the incorporated definition of the establishments under Shops and Establishments Act would not be applicable to the establishment of the petitioners in the State of Maharashtra. We have reproduced the definition of Establishments under the Labour Welfare Act and the explanation. The explanation, provides that where an establishment has different branches or departments, all such branches or departments, whether situated in the same premises, or different premises shall be treated as part of the same establishment. The test, therefore, is do that the petitioners have an establishment or establishments in the State of Maharashtra, which would fall within the meaning of the expression "establishment" under Labour Welfare Act. If there be an establishment and even assuming that the activity of mining is predominant activity,

are the petitioners excluded from the provisions of the Labour Welfare Act. The Mines Act, 1958 (hereinafter referred to as "Mines Act") provides for various activities including carrying out mining operations and other provisions as set out therein. Section 3 of the Mines Act sets out as to which provisions of the Act will not apply to certain mining activities. The Mines Act (Central) has been enacted with the object of regulating and inspection of mines and contains provisions for health and safety, hours of work, limitation of employment and other activities. The Act itself does not exclude the operation of any other law expressly. The Act defines a mine under Section 2 (5) of the Mines Act. As per the definition, various activities connected with the mining operation are included within the meaning of the word mine. These are activities in the precints of the mines and includes premises adjecant to the mines. None of the premises refered to by the petitioners are in the precincts and or adjecant to the mines. At any rate the Act provides for regulating the operations of mines and carrying out inspection, control on the operation of mining activities, health and safety of the workers, hours and limitation of employment, provision for leave and

procedure for levying penalties for breach thereof. The object of the Labour Welfare Act on the other hand is to seek contribution to a fund, for financing activities to promote Welfare of Labour in the State of Maharashtra and not necessarily those working in the mine or establishments from whom contribution is statutorily sought There is, therefore, no implied exclusion of the provision of the Labour Welfare Act. As such, if mine is included in the definition of the establishment or any establishments which falls within the extended meaning of the word mine, then it would fall under the definition of establishment under the Labour Welfare Act and will be covered by the provisions of the Labour Welfare Act. In other words, the test of predominant activity would be immaterial. The test would be whether the establishment falls within the meaning of Section 2(4), and if it be an establishment, are the persons working there employees within the meaning of Section 2(2) of the Labour Welfare Act. In our opinion, therefore, the mere fact that there are establishments which support the activity of mining would be of no consequence. The real test would be, whether such an establishment would be required to be registered under the provisions of Bombay Shops and Establishments Act,

1948, without looking into the exemption clause. If it is required to be registered, under the Shops and Establishments Act and by virtue of incorporation of the definition of establishment in the Bombay Labour Welfare Act, then it is an establishment which will be covered. In our opinion, the second contention as urged is also devoid of merit.

7. We may now deal with the issue of exemption. Section 22 reads as under. -

> Exemptions.-
>
> The State Government may by notification in the Official Gazette exempt any class of establishment from all or any of the provisions of this Act subject to such conditions as may be specified in the notification.

. It is, therefore, clear that it is open to the State Government if satisfied to exempt any clause of establishment from any of the provisions of the Act. A reading therefore would indicate that it is not an establishment but a definable class of establishments which can be exempted. We proceed on the footing that the various establishments of the petitioners constitute a class for the purpose of Section 22 of the Act. In the first application made to the State Government for exemption on 5th April, 1994, this is

what the petitioner stated.

> "We may state that our present application for exemption from the provisions of the Bombay Labour Welfare Fund Act, 1953 is being made not with a view to save any amount but to avoid avoidable paper work involved in maintaining books and collecting contributions due to peculiar classification of the Commission's work centres under the Mines Act, 1952, the Factories Act, 1948 etc.

. The entire tenor of the application was to exempt the petitioners' establishment in order to avoid paper work. Incidently, it was pointed out that the petitioners themselves were providing various welfare measures and facilities to their workmen. The respondent No. 3, on coming to know of the representation addressed a letter to respondent No. 1 setting out why the petitioners' establishment should not be exempted from the purview of the Act. A copy was forwarded to the petitioners. The petitioners, thereafter, addressed one more communication dated 20th February, 2001, seeking exemption and setting out the various performances by way of welfare measures that their employees were being granted. The State Government, however, by the communication dated 4th September, 2002 in the exercise of its power intimated to the petitioners that the application of exemption is rejected. Can it be said that this is arbitrary

and warranting interference by this Court. We may at once note that the purpose of the welfare fund is not only to give benefits to the employees working in the establishment of the petitioners, but the object is to provide benefits to all employees in the State of Maharashtra in general who come under the provisions of the Labour Welafare Act. The fact, therefore, that an employer may be granting benefit to its employees is irrelevant and immaterial considering the object of the Act. This issue has also come up for consideration in the Board of Trustees of Port of Bombay (Supra) which we have referred to earlier. The learned Division Bench of this Court observed that Act does not confer right to get exemption from the provision of the Act but merely confers power of the Government to grant exemption. This power can be exercised by the State Government to avoid serious hardship. In the instant case, the only reason given by the petitioners for exemption was to avoid paper work and incidently that they were providing benefits to the employees. In our opinion, the welfare Legislation enacted with the avowed object of providing facility to the employees cannot be rendered unworkable by exempting establishments from contribution, except for good and valid reason, which

could include hardship. It is presumed that the legislature while enacting the law was aware that there are various labour Legislation including the Factories Act which require various benefits to be given to the employees. The Legislature did not enact the Act only for the benefit of those employees who contribute under the Act but to give benefit to employees who are in need of the same. In our opinion, therefore, the petitioners have not been able to discharge their burden that the decision of the State Government in rejecting the application was arbitrary and unreasonable. That contention, therefore, must be rejected.

8. The two other contentions urged before us can be decided. Firstly that respondent No. 3 did not consider that the establishments of the petitioner were established only in the year 1977. The communication of 18.08.1993 would indicate that the demand was made on the establishments of the petitioners being inspected. It was a duty cast on the petitioners to produce the material to indicate as to when they have commenced the activities. However, considering the facts and circumstances, we can give this liberty to the petitioners by permitting them to

furnish such material to respondent No. 3, who will consider the same and thereafter make a revised demand, if the contention is accepted according to law.

9. The other contention, which was urged before us that persons who do not fall within the expression employees a demand has also been made in respect of them. Once again the duty was cast upon the petitioners to provide material to show those amongst the staff who were excluded from the definition of employee. We are, however, of the opinion that an opportunity should be given to the petitioners to produce the said material and if the said material is produced, the respondent No. 3 to pass appropriate orders including revising the earlier demand. To that limited extent we are inclined to remit the matter to respondent No. 3 for reconsideration.

10. For the aforesaid reasons, we partly allow the petition by issuing the following directions:

(i) The contention as urged on behalf of petitioners that as they are exempted under the provisions of Shops and Establishment Act, and as such are outside the purview of the Bombay Labour Welfare Fund, 1953, is

devoid of merit and hence, rejected.

(ii) The contention as urged on behalf of petitioners that they are predominantly carrying on mining activities in the ocean and as such their Establishments and Factories are not "Establishments" within the meaning of the Bombay Labour Welfare Fund, 1953, is also rejected.

(iii) The contention of the petitioner that the Respondents is not granting the exemption under Section 22 of the Act, acted arbitrarily or unreasonably is also rejected.

(iv) In so far as the contention of the petitioners that the Respondents have wrongly made a demand by applying the provisions of the Act from 1971, considering their contention that the activities in Maharashtra commenced only in 1997, requires to be considered by giving an opportunity to the petitioners to place the relevant material before the respondent No. 3. The Respondent No. 3, then to consider the same and pass appropriate orders.

(v) The contention urged on behalf of petitioners that the Respondent could not have included supervisors drawing more than Rs. 2500/- per month as they are not employees, has some merit. It will be open to the petitioners to produce a list of such persons before the Respondents to point out that they should not be counted for making a demand under the provisions of the Act. If such material is produced the Respondent No. 3 to pass appropriate orders according to law.

(iv) The parties to appear before the respondent No. 3 on 28.09.2006 at 11=00 a.m. Respondent No. 3 thereafter to give opportunity to the parties to place the material and pass appropriate orders not later than four months from 28.09.2006.

(vii) Prothonotory and Sr. Master on the receipt of copy of this order, to permit the Respondent No. 2 to withdraw the amount along with accumulated interest if any. That amount be kept on account by the respondent No. 2, subject to the adjustment and/or direction issued by the respondent No. 3 in the event the respondent No. 3 directs the refund of the amount.

(viii) Rule made absolute accordingly.

(ix) There shall be no order as to costs.

[F.I. REBELLO, J.]

[SMT. V.K. TAHILRAMANI,J]